ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Systems Integrated	)	ASBCA No. 54439
	)	
Under Contract Nos. N00014-88-C-6035	)	
N00014-88-C-6021	)	
N00014-90-C-6031	)	

APPEARANCE FOR THE APPELLANT: Brian J. Donovan, Esq.
Jones & Donovan
Newport Beach, CA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Evadne Sanichas, Esq.
Senior Trial Attorney
Western Litigation Office
San Diego, CA
Armand R. R. Beede, Esq.
Associate Counsel
U.S. Naval Research Laboratory

OPINION BY ADMINISTRATIVE JUDGE DELMAN

In this appeal, Systems Integrated (appellant or SI) contends, *inter alia*, that the Department of Navy wrongfully failed to negotiate and to provide appellant with an equitable distribution of property under the Limitation of Cost (LOC) and Limitation of Funds (LOF) clauses of the subject contracts. A hearing was held on entitlement only. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613.

FINDINGS OF FACT

1. The Department of Navy, Stennis Space Center, MS, awarded Contract No. N00014-88-C-6035 (Contract No. 6035), Contract No. N00014-88-C-6021 (Contract No. 6021), and Contract No. N00014-90-C-6031 (Contract No. 6031) to appellant on

22 September 1988, 26 May 1989, and 7 September 1990, respectively.[1] By amendment, the contract number for Contract No. 6021 was changed to Contract No. 00014-89-C-6021. Generally, these three contracts were for research and development in the area of antisubmarine warfare (ASW). (Gov't supp. R4, tabs 1, 3, 5) The contracts were cost plus fixed-fee contracts.

2. Under Contract No. 6035, appellant was to perform work described in its proposal for the design and development of an integrated data archival and processing system (gov't supp. R4, tab 1 at 004). Under Contract No. 6021, appellant was to perform work described in its proposal for the design and development of a portable multi-channel acoustic data collection and processing system (gov't supp. R4, tab 3 at 065). Under Contract No. 6031, appellant was to perform work described in its proposal for the design and development of a modular multi-platform performance assessment, prediction and simulation system (gov't supp. R4, tab 5 at 118).

3. Insofar as pertinent, FAR 32-705.2 CLAUSES FOR LIMITATION OF COST OR FUNDS, provided as follows:

> (a) The contracting officer shall insert the clause at 52.232-20, Limitation of Cost, in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated,…
>
> . . . .
>
> (c) The contracting officer shall insert the clause at 52.232-22, Limitation of Funds, in solicitations and contracts if an incrementally funded cost-reimbursement contract is contemplated.

The government determined whether an incrementally funded or a fully funded contract was contemplated at the time of the preparation of the solicitation. The government contemplated that each contract would be incrementally funded, since the government lacked sufficient funding to fully fund any of the contracts at the outset. (Tr. 3/22) Accordingly, the LOF clause was included in each solicitation.

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[1] Contract Nos. 6035 and 6021 were awarded by the Naval Ocean Research and Development Activity (NORDA), which later became known as the Naval Oceanographic and Atmospheric Research Laboratory (NOARL). NOARL awarded Contract No. 6031 and later became known as the Naval Research Laboratory (NRL). For ease of reference, we shall refer to the award activity on all contracts as the "government" or the "NRL".

4. The government's procurement contracting officer (PCO) explained the government's practice of identifying both the LOF and LOC clauses in the solicitation and contract documents. The LOF clause would govern under the incrementally funded contract until the contract was fully funded, at which time the LOC clause would replace the LOF clause. In each of the subject contracts, the government provided at Section I ("CONTRACT CLAUSES"), as follows:

> (b) ADDITIONAL FAR AND DFARS CLAUSES
> This contract incorporates the following checked clauses by reference with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available.
>
> ( ) FAR 52.232-20 Limitation of Cost (APR 1984)
> (Applicable only when contract action is fully funded)
>
> OR
>
> (X) FAR 52.232-22 Limitation of Funds (APR 1984)
> (Applicable only when contract action is incrementally funded)

(Tr. 1/202-07; gov't supp. R4, tab 1 at 014, tab 3 at 075, tab 5 at 129)

5. Paragraph G.4 of each contract also specified that payments were "subject to the applicable contract clause entitled 'Limitation of Cost' or 'Limitation of Funds' per Section I." (Gov't supp. R4, tab 1 at 006, tab 3 at 072, tab 5 at 126)

6. Insofar as pertinent, the LOF clause in each contract provided as follows:

> LIMITATION OF FUNDS (APR 1984)
>
> (a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule . . . . The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, . . .
>
> (b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered, the Government's share of the cost if this is a cost-sharing contract, and the period of performance it is estimated the allotted amount will cover. The parties contemplate

that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the Schedule, exclusive of any fee. The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid and payable by the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government . . . . The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

(e) If, after notification, additional funds are not allotted by the end of the period specified in the Schedule or another agreed-upon date, *upon the Contractor's written request the Contracting Officer will terminate this contract on that date in accordance with the provisions of the Termination clause of this contract*. If the Contractor estimates that the funds available will allow it to continue to discharge its obligations beyond that date, it may specify a later date in its request, and the Contracting Officer may terminate this contract on that later date.

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause —

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in

> excess of (i) the amount then allotted to the contract by the Government . . . until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract
>
> . . . .
>
> (h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.
>
> . . . .
>
> (k) *Nothing in this clause shall affect the right of the Government to terminate this contract. If this contract is terminated, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.*

(Emphasis added)

7. The EXPLANATION OF LIMITATION OF FUNDS clause in each contract identified an estimated cost for the contract, and provided that the contract would not exceed this cost plus a specified fixed fee. The clause also identified the specific amount presently available for payment and allotted to each contract. (Gov't supp. R4, tab 1 at 006, tab 3 at 067, tab 5 at 121)

8. Insofar as pertinent, the LOC clause, FAR 52.232-20, provided as follows:

> LIMITATION OF COST (APR 1984)
>
> (a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule . . . . The Contractor agrees to use its best efforts to perform the work

specified in the Schedule and all obligations under this contract within the estimated cost . . . .

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that —

(1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause —

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule . . . .

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. . . .

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost. . . .

. . . .

> *(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.*

(Emphasis added)

Funding of the Contracts

9. Under each contract, funding for the work came from government sponsors (tr. 3/13). Funding increments were added to each contract via contract modification, and the contract as modified reflected the increased amount available for payment and allotted to the contract. (*E.g.*, gov't supp. R4, tab 2 at 025) There was a specific tasking identified with each additional increment of funding, which was described in the funding paperwork kept by the NRL finance office (tr. 3/39). The contract modifications did not describe these specifically defined tasks.

10. Contract No. 6035 was fully funded by Modification No. P00017, dated 28 March 1991. This modification substituted the LOC clause for the LOF clause, and deleted clause G.2, Explanation of Limitation of Funds. (Gov't supp. R4, tab 2 at 025, 027)

11. Contract No. 6021 was fully funded by Modification No. P00011, dated 4 May 1990. This modification substituted the LOC clause for the LOF clause, and deleted clause G.2, Explanation of Limitation of Funds. (Gov't supp. R4, tab 4 at 093-94)

12. With respect to Contract No. 6031, the last contract modification to add funding to the contract was Modification No. P00020, dated 13 April 1992. Modification No. P00020 added $66,000 to the contract, which reflected the balance of funding available from the sponsor at that time (tr. 3/36-7). This raised the total obligated amount on the contract to $4,212,702.69, or 99.83 percent of the ceiling price. (Gov't supp. R4, tab 6 at 153, 154; tr. 3/35) In order to fully fund the contract, there remained $7,109.31 to be placed on the contract. The government did not place any additional funds on the contract, and it was not fully funded. According to the PCO, as long as the contract was funded below the ceiling, the LOF clause applied (tr. 1/207-8), and this would remain the case even if funding came "very, very close" to the ceiling (tr. 1/213-14). Accordingly, we find that the LOF clause remained part of the contract.

13. The PCO also addressed a Board question about whether a contract with a small balance remaining for potential allotment should be considered "virtually" fully funded:

THE WITNESS: The only thing I can say to that, your Honor, is that even though it was, let's say, $10,000, that may be the difference between the completion of the project and not. I mean, the program, the effort within the contract. And the reason is, I mean, they may - - the $10,000 may have funded the final piece of programming that went in there that made the entire system operate.

So, it is really hard - - it is really hard to say that it is fully, you know, it is fully funded unless you actually have all of the money in there, because without it you may not be able to complete the entire effort.

(Tr. 2/36-7). The PCO would not, and did not in this case, deliberately withhold available funding dollars from the contract for any purpose. He would not leave funding at 99.83 percent if funding was available. (Tr. 2/37)

14. The parties' focus moved from Contract No. 6031 to a new but similar contract with appellant, Contract No. N00014-92-C-6009 (Contract No. 6009). In May, 1991, appellant submitted a proposal to design and develop a prototype Surtass Passive/Active Detection Enhancement System (SPADES), which continued its ASW work (app. supp. R4, tab 19). The government awarded this cost plus fixed fee contract to appellant in August, 1992, at an estimated cost ceiling of $14,945,987.00 (app. supp. R4, tab 20, Section G), which was substantially larger than any of the award amounts under the prior three contracts. Alliant Techsystems (Alliant) purchased appellant's government business shortly thereafter, in November, 1992, and Contract No. 6009 was novated to Alliant. Based upon the foregoing, the government did not take any action to add more funding, place additional work or to terminate Contract No. 6031. Nor did appellant seek any additional funding, additional work or the termination of this contract. (Tr. 3/30-32) The contracting officer's technical representative (COTR) stated:

[T]here really wasn't much reason for us to go back there, and they never notified us that there was an unfunded ceiling that we could take advantage of. That is to say, it fell through the crack in the floor. We just basically forgot to go back and close that out, or terminate it, or whatever it is that we might have done.

Q And just so the record tracks, you said they never notified us, you were referring to whom?

A I am sorry, yes, the contractor Systems Integrated that still held contract number 6031 never came

> back and said, gee, NRL, we still have 7,000 or 10,000 or whatever the number is in the ceiling and isn't there something else that you want us to do. It just never came up. And for whatever reason, we could have done several things had that happened, but at the time, we were very busy worrying about other things.

(Tr. 3/31-2) However, the COTR did not have the authority to modify the contract. He was primarily the technical liaison between the PCO and the contractor (tr. 2/11). He was responsible to monitor technical progress, funding, and appellant's technical and financial status reports (tr. 3/11-12). There is no evidence of record to suggest that the PCO's failure to fully fund Contract No. 6031 stemmed from a desire to deprive appellant of any material contract benefit, or to obtain any other material advantage over appellant.

Performance and Billing

15. Under Contract No. 6035, appellant designed and provided, *inter alia*, the Experimental Line Array Measurement System (ELAMS). The ELAMS was not originally part of Contract No. 6035, but was added to the contract by the parties. Appellant later upgraded the ELAMS and provided a user's guide and functional specification under Contract No. 6031. (Gov't supp. R4, tab 188 at 5826) ELAMS had the flavor of an ASW effort and was a line array measurement system, which is what appellant was otherwise working with under these three contracts (tr. 1/184). The government applied the funding it received for the ELAMS against the existing contract ceilings for Contract Nos. 6035 and 6031, that is, it did not increase either contract ceiling as a result of this work (tr. 1/183-84).

16. During the performance of Contract No. 6031, appellant identified a Naval office at Port Hueneme, CA, that had a need for 15 computer work stations from Sun Microsystems, Inc. (Sun), but had no contract vehicle under which to obtain them. Although this equipment was not needed by appellant to perform under this contract, appellant wished to accommodate Port Hueneme, and appellant's program manager asked the COTR whether this equipment could be purchased under its contract. After coordinating with the PCO, it was determined that the equipment could be purchased under this contract, since there was some connection between Port Hueneme and NRL work activities. (Tr. 3/16-19) Port Hueneme provided money to NRL for the equipment and the PCO added the money as an increment to Contract No. 6031 by Modification No. P00019, dated 2 March 1992 (supp. R4, tab 6 at 155). Appellant issued a purchase order to Sun dated 12 March 1992; the equipment was delivered to Port Hueneme; Sun billed appellant on 27 March 1992; and appellant issued a check to Sun dated 28 May 1992 (supp. R4, Tab 180 at 565-68). As of May, 1992, however, appellant had already overrun the cost ceiling of the contract (*see* finding 22).

17. Under Contract No. 6035, appellant's work was to be performed through 21 September 1991 (gov't supp. R4, tab 1 at 005). Under Contract No. 6021 appellant's work was to be performed through 14 May 1991 (gov't supp. R4, tab 3 at 066). Under Contract No. 6031, appellant's work was to be performed through 31 August 1994 (gov't supp. R4, tab 5 at 119). It is undisputed that appellant performed under all contracts, and the government accepted the deliverables tendered by appellant.

18. Each contract contained the clause FAR 52.249-06 TERMINATION (COST REIMBURSEMENT) (MAY 1986) (gov't supp. R4, tab 1 at 012, tab 3 at 073, tab 5 at 127). Insofar as pertinent, the clause stated as follows:

> TERMINATION (COST-REIMBURSEMENT) (MAY 1986)
>
> (a) The Government may terminate performance of work under this contract in whole or, from time to time, in part, if–
>
> (1) The Contracting Officer determines that a termination is in the Government's interest, or
>
> (2) The Contractor defaults in performing this contract and fails to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger performance.

The government did not terminate the performance of work under any of the contracts pursuant to this clause, or through any other procedure. Appellant was also able to request a termination of Contract No. 6031 under procedures provided in subsection (e) of the LOF clause (finding 6). It did not exercise this right.

19. Under each contract, appellant submitted vouchers periodically to the government for payment. The voucher indicated appellant's current cumulative costs incurred, *i.e.*, appellant's actual direct costs with indirect cost mark-ups, using provisional indirect billing rates, and also indicated the ceiling/allotted available funds on that contract. The voucher allowed a reader to determine whether, and the extent to which the cumulative costs billed to date were under or above the allotted available funds for the contract. (*E.g.*, gov't supp. R4, tab 22 at 1109)

20. With respect to Contract No. 6035, the last voucher that appellant submitted during contract performance was Voucher No. 20, dated 12 August 1991. Voucher No. 20 indicated that appellant's incurred cumulative costs to date, 31 July 1991, were $1,205,847.22. Voucher No. 20 showed total allotted amount/estimated cost as

$1,211,165.00. Therefore, as of 31 July 1991, appellant's total cumulative billed cost was $5,317.78 below the estimated contract cost. (Gov't supp. R4, tab 217 at 3, 4) Appellant continued to incur direct costs, in excess of $5,317.78, on the contract for a number of months thereafter. (*E.g.*, gov't supp. R4, tab 176 at 249) We find that appellant incurred costs over and above the estimated cost ceiling under Contract No. 6035. Based in part upon a subsequent audit of its indirect rates *(infra)*, appellant determined and we find that appellant exceeded the cost ceiling in May, 1991 (app. supp. R4, tab 77 at 3).

21. With respect to Contract No. 6021, the last voucher that appellant submitted to the government during performance was Voucher No. 13, dated 30 August 1990. Voucher No. 13 indicated that appellant's incurred cumulative costs to date, 15 July 1990, were $1,288,824.05. Voucher No. 13 also showed total allotted amount/estimated cost as $1,289,222.00. As of 15 July 1990, appellant's total cumulative billed cost was $397.95 below the estimated contract cost. (Gov't supp. R4, tab 217 at 1, 2) Appellant continued to incur direct costs in excess of $397.95 to the contract for a number of months thereafter. (Gov't supp. R4, tab 176 at 250) We find that appellant incurred costs over and above the contract cost ceiling under Contract No. 6021. Based in part upon a subsequent audit of its indirect rates *(infra)*, appellant determined and we find that appellant exceeded the cost ceiling in May, 1990 (app. supp. R4, tab 77 at 3).

22. With respect to Contract No. 6031, the last voucher that appellant submitted to the government during performance was Voucher No. 25, dated 20 May 1992. Voucher No. 25 indicated that appellant's incurred cumulative costs to date, 31 March 1992, were $3,951,605.86. Voucher No. 25 showed the total allotted/estimated cost was $3,951,614.54 and the total allotted amount including fee was $4,212,702.69. Therefore, as of 31 March 1992, appellant's total cumulative billed cost was $8.68 below the allotted estimated contract cost. (Gov't supp. R4, tab 217 at 5, 6) Appellant continued to incur direct costs in excess of $8.68 under the contract for a number of months thereafter. (Gov't supp. R4, tab 176 at 251) We find that appellant incurred costs over and above the total allotted amount available under Contract No. 6031. Based in part upon a subsequent audit of its indirect rates *(infra)*, appellant determined and we find that appellant exceeded the allotment ceiling in February, 1992 (app. supp. R4, tab 77 at 3).

23. It is undisputed, and we find that appellant did not timely notify the government of any impending cost overruns during performance of the subject contracts, as provided by the LOF or LOC clauses. Appellant's accounting system was in transition from a manual to a computerized system, and it did not generate reports to advise corporate management of monthly cost build-ups (tr. 3/167-69). During performance, the government was also unaware of any cost overruns (tr. 2/14). The PCO testified that if he had learned of cost overruns during performance, he would have considered the issuance of a stop work order (tr. 2/15-16).

Appellant's Proposed Final Indirect Cost Rates for FY 1990 and FY 1991

24. Each contract contained the clause entitled FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984). Paragraph (d)(2) of the clause provided that a contractor was to furnish its proposed final indirect cost rates ("PFICR") to the government within 90 days after the expiration of each of its fiscal years, or by a later date approved by the contracting officer. Appellant's fiscal year corresponded with the calendar year, *i.e.*, each ended 31 December (tr. 3/201). Absent a later date approved by the contracting officer, appellant's PFICR for FY 1990 was due by the end of March 1991, and its PFICR for FY 1991 was due by the end of March, 1992.

25. By letter dated 7 February 1992, the administrative contracting officer (ACO) advised appellant that appellant's PFICR for FY 1990 was overdue. On 26 June 1992, appellant submitted its PFICR for FY 1990 and FY 1991. These submissions did not contain, *inter alia*, a schedule of contracts or certifications for the indirect costs. **(**Gov't supp. R4, tab 45)

26. By letter to appellant dated 28 June 1993, the ACO stated that appellant's FY 1990 and FY 1991 submissions were incomplete, and requested that appellant resubmit them by 10 July 1993 (gov't supp. R4, tab 59). Appellant did not do so. DCAA returned appellant's submissions by letter dated 16 July 1993. (Gov't supp. R4, tab 61)

27. On 30 September 1993, appellant refiled its FY 1990 and FY 1991 submissions (gov't supp. R4, tab 67). On a number of occasions throughout 1994, DCAA asked appellant for access to its general ledger and other supporting documentation for the audit of appellant's submissions (gov't supp. R4, tab 73). Appellant was unable to prepare a general ledger from its source data (tr. 4/52). By letter dated 30 August 1994, appellant advised DCAA that it needed to reconstruct the general ledger from its source data (gov't supp. R4, tab 74). In November, 1994, appellant refiled the submissions for FY 1990 and 1991 based on the general ledger it had recreated. (Gov't supp. R4, tab 88 at 6290)

28. Appellant's submissions for FY 1990 and FY 1991 included "related party" costs for lease transactions between appellant and The Leasing Company, which was owned by an officer of appellant. These leases were for the following: the building in San Diego in which appellant performed the three contracts; certain automobiles and trucks; an airplane; and miscellaneous office equipment. (Gov't supp. R4, tab 88 at 6263-65) It is undisputed that The Leasing Company and appellant were related parties, that is, under common control.

29. DCAA requested lessor cost data for the related party lease costs included in appellant's FY 1990 and FY 1991 cost submissions. Appellant was of the view that the

government was not entitled to this information. At a meeting on 4 April 1995 with DCAA and the ACO, appellant stated that it would not permit DCAA to review any of the requested documents of The Leasing Company. (Gov't supp. R4, tab 80; tr. 3/227-28) The DCAA auditors and appellant reached an impasse on this issue.

30. Appellant asked for the intervention of the DCAA's regional audit manager. By letter to appellant dated 12 May 1995, the regional audit manager concluded that appellant's allegations were without merit. (Gov't supp. R4, tab 82)

31. The DCAA audit report, dated 29 September 1995, questioned all the related party lease costs, due to appellant's refusal to provide cost data in support of these costs (Gov't supp. R4, tab 88 at 6263-64). The audit report also included calculations of potential penalties for unallowable costs (*id.* at 6266, 6272, 6278, 6283).

32. By letter to appellant dated 13 March 1996, the ACO forwarded to appellant the DCAA audit report, previously provided to appellant in draft. The letter stated that supporting documentation was required to resolve the issue of the lease costs (gov't supp. R4, tab 89). Appellant forwarded its response to the DCAA audit report on 10 May 1996, stating that it disagreed with the DCAA position but was willing to discuss the matter further with hopes of reaching a compromise (gov't supp. R4, tab 96).

33. On 11 September 1996, appellant, the ACO, and DCAA met to discuss the related party lease issue. During the meeting, appellant agreed to provide DCAA access to certain records of The Leasing Company (tr. 2/60). Appellant also advised that it would file its PFICR for FY 1992 after the parties settled the issues for FY 1990 and FY 1991, and the ACO concurred (tr. 2/91).

34. In the September, 1996 meeting, appellant also advised the government that it had overrun the contracts, but would be willing to absorb the costs if the government returned the 15% fee withheld and waived penalties (tr. 2/84-85). The government did not accept appellant's offer. By September 1996, appellant's officers had become aware that appellant had incurred overruns on the subject contracts in the order of magnitude of around a million dollars (tr. 3/192).

35. By letter to the government dated 25 September 1996, appellant forwarded additional supporting data regarding The Leasing Company (gov't supp. R4, tab 101). Based on the new information provided, DCAA was of the view that the leases for the building, automobiles, and office equipment (but not for the airplane) met the test prescribed in the FAR regarding what constituted an "established practice" of leasing to others, and that supplemental audit field work would address the reasonableness of appellant's lease expenses. (Gov't supp. R4, tab 104)

36. By letter to appellant dated 17 December 1996, the ACO informed appellant of DCAA's revised opinion based on the new documentation provided by appellant. With respect to the subject of overruns, the letter stated as follows:

> In the meeting held on September 11, 1996, SI stated that they do not intend to request additional funds from the buying commands for contracts which were overrun. At that time, SI requested that the ACO waive all penalties based on SI's overruns. To date, the total amount of overruns SI intends to absorb has not been provided for verification.
>
> It should be noted that the ACO does not have the authority to waive a contractor's debt. If SI does not qualify for a waiver of penalties, it is suggested that SI request the additional funds applicable to the overruns from the buying commands in order to alleviate any financial burden of the penalty assessment. DCAA intends to recalculate all penalties based on review of the additional supporting documentation provided by SI.

(Gov't supp. R4, tab 105 at 4965)

37. Appellant failed to provide the additional data requested by DCAA. By letter to appellant dated 25 February 1997, the ACO forwarded a "Notice of Intent to Issue my Contracting Officer's Decision" regarding appellant's PFICR for FY 1990 and FY 1991. The letter detailed potential penalties totaling $984,278, plus interest, for these two years. The ACO advised that appellant's response was required no later than 28 March 1997. (Gov't supp. R4, tab 108)

38. Appellant's controller and the ACO discussed this matter on 18 March 1997. Appellant indicated that it was willing to make additional data available to the DCAA. The ACO, in return, stated that the letter of 25 February would be inoperative. (Gov't supp. R4, tab 109) Appellant made the additional data available to DCAA on 2 May 1997 (gov't supp. R4, tab 113).

39. DCAA issued its supplemental audit report addressing appellant's revised FY 1990 and FY 1991 submissions on 11 July 1997. Appellant agreed with the rates determined by DCAA. (Gov't supp. R4, tab 118 at 6330) By letter to appellant dated 17 July 1997, the ACO waived penalties on any unallowable costs (gov't supp. R4, tab 120).

<u>The Government's Loss of Records and Its Disposition of Some of the Property Produced or Purchased Under the Contracts</u>

40. In late 1992/early 1993, the finance office at NRL went through a period of transition, at the end of which it was shut down and its records were transferred to the main laboratory facility in Washington, D.C. While in route to their new resting place, the documents were left out on a loading dock in the rain and were irreparably damaged. These documents included the funding records for these contracts and documentation identifying the specific taskings for each funding increment. (Gov't supp. R4, tab 191 at 6149-50; tr. 3/44)

41. Appellant received certain items of government furnished property (GFE) for its use under these contracts. This GFE, along with some items produced or purchased by appellant under the subject contracts, were used by appellant under Contract No. 6009, the follow-on contract awarded to appellant in 1992 (finding 14). When appellant's government business division was sold to Alliant in 1992 and this contract was novated to Alliant, Alliant employed the same SI personnel at the same location and also used the above equipment to perform this work. (Tr. 3/56)

42. Within two years, Alliant was bought out by Raytheon, and shortly thereafter Raytheon was bought out by Hughes. The above equipment thus fell into Hughes' possession. In July 1997, the COTR obtained from Hughes an inventory list of the government property in its possession related to these contracts. The COTR identified certain government personnel at NRL who were interested in some of these items. (Tr. 3/56-66)

43. Hughes shipped the property to NRL in late 1997 (tr. 3/66). Approximately 50 to 70 percent of the items were placed in excess or surplus soon after they were received (tr. 3/103). Of the remaining items, the COTR divided them into two categories: Items previously requested by interested government personnel, and items that were not previously requested but were still useful to the government (tr. 3/76).

44. The items from Hughes were only a part of the total items produced and purchased by appellant for the government under Contract Nos. 6035, 6021, and 6031. This can be determined by comparing the Hughes' inventory list to the list of deliverables identified by appellant in its final reports to the government under these contracts (gov't supp. R4, tabs 55, 56, 57). Certain deliverables were deployed on Navy vessels in furtherance of ASW efforts (tr. 3/139-43).

45. From August 1993 through mid-1997, the COTR moved offices a number of times. Each time he moved, he destroyed many of his personal copies of documents relating to these contracts. These materials included his personal logs and notebooks, as well as copies of funding documents and other official government documents that he had kept for personal reference during performance of the contracts. (Tr. 3/43-44, 135-36)

46. In the year 2000, NRL automated its inventory information, and much of the NRL inventory information pre-dating this automation was no longer maintained. (Tr. 3/79-80)

Appellant's PFICR for FY 1992

47. As of the spring of 1998, appellant had not filed its PFICR for FY 1992. By email to the ACO dated 8 June 1998, the government's contract administrator (CA) reported a telephone conversation on 5 June 1998 with appellant's president, in pertinent part, as follows:

> She says her accounting department is small and the people with the company who would have had some of the information they need are no longer there. They are "juggling so many balls right now." She could not give me an estimated date for submitting the claim. She promised to keep me posted. She said the claim might be submitted by the end of summer, but couldn't commit to it.

(Gov't supp. R4, tab 135) By letter to the ACO dated 9 October 1998, appellant submitted its PFICR for FY 1992 (gov't supp. R4, tab 145).

48. By letter to appellant dated 19 November 1998, the ACO stated that appellant's PFICR for FY 1992 was inadequate, and asked when appellant would correct the deficiencies in the submission (gov't supp. R4, tab 148). Appellant provided the requested information by letter dated 17 June 1999 (gov't supp. R4, tab 149).

49. DCAA issued its audit report addressing appellant's FY 1992 incurred cost submission on 25 September 2000. Appellant accepted the indirect cost rates determined by DCAA (gov't supp. R4, tab 158 at 2307).

The Cost Overrun/Equitable Distribution Claim

50. On 18 February 1998, appellant's controller telephoned the CA to ask for a point of contact for the buying activity for Contract Nos. 6035 and 6021 (tr. 4/97-98). The CA's notes of this conversation state: "Ktr to try & request funding of overrun before submitting final voucher." (Gov't supp. R4, tab 131)

51. Once the FY 1992 indirect rates were determined and agreed upon by the parties in September, 2000, appellant was able to quantify the precise dollar amount of all cost overruns under the three contracts (tr. 3/177). However, appellant did not submit its claim for almost two years.

52. By letter to appellant dated 6 October 1999, the ACO inquired about the status of any overrun claim from appellant as follows:

> On April 21, 1998 you advised you would be requesting additional funds to cover cost overruns on the following contracts:
>
> N00014-89-C-6021
> N00014-88-C-6035
> N00014-90-C-6031
>
> We have not received any correspondence from your company evidencing pursuit of additional funding. We would like to close these contracts as soon as possible. Please provide status.
>
> Your response by October 22, 1999 will be appreciated.

(Gov't supp. R4, tab 152)

53. By letter to appellant dated 10 November 1999, the ACO stated that appellant had not replied to the letter of 6 October 1999, and asked for a reply by 1 December 1999 (gov't supp. R4, tab 154). By letter dated 21 December 1999, the government reminded appellant that it had not replied to the letters of 6 October 1999 or 10 November 1999, and asked for a reply by 15 January 2000. (Gov't supp. R4, tab 155) Appellant did not reply to these inquiries.

54. Throughout this period and for several years thereafter, appellant sought to locate its contract records related to the subject contracts. In late 1992, appellant sold its government contracts division to Alliant. Contract Nos. 6035, 6021 and 6031 were not included in the sale, but appellant nevertheless transferred these contract files to Alliant. (Gov't supp. R4, tab 162; tr. 1/29) Appellant's controller stated that appellant was searching for the missing contract files, in part, because "that might help in our decision as to whether we are going to pursue an overrun claim or not." (Tr. 4/111-12)

55. By letter to appellant dated 11 June 2001, the ACO reminded appellant of the government's previous requests for appellant's submission of final vouchers to close out the contracts (gov't supp. R4, tab 161). Appellant replied on 20 June 2001, stating as follows:

> Systems Integrated (SI) is in receipt of your letter dated 6/11/01. During our DCAA overhead claim audit of 90, 91

> and 92, it came to my attention that there were significant cost overruns on the three referenced contracts: C-6021, C6031 [sic] and C-6035. Systems Integrated is in the process of pursuing reimbursement of these cost overruns.
>
> During late 1992, SI sold its government services division to Alliant Tech (which has since been acquired several times). The new owner transferred many of the contract files that would be required as support for the reimbursement to the Seattle, Washington area. Systems Integrated has been in contact with the custodian of those records in an effort to obtain the files. To date we have not had success, but we continue our pursuit of the records.
>
> Closing the contract while actively pursuing cost reimbursements, we feel, would not be in the best interest of the Company. Therefore, SI hereby requests a one-year extension for closing the referenced contracts. We feel this extension will give SI adequate time to ascertain whether a reimbursement claim is plausible.

(Gov't supp. R4, tab 162)

56. On 28 February 2002, appellant met with the ACO to discuss the status of the contracts. During this meeting, appellant indicated that it was still trying to locate its contract records in order to determine whether it would pursue a claim for payment of the overruns. (Gov't supp. R4, tabs 164, 175 at 1379)

57. By letter to the PCO dated 7 June 2002, appellant submitted a request for reimbursement of cost overruns under the subject three contracts, in the amount of $1,184,507 (gov't supp. R4, tab 170). By letter to appellant dated 3 July 2002, the government asked appellant to provide supporting information to evaluate appellant's request for payment. (Gov't supp. R4, tab 172)

58. On 31 July 2002, appellant certified its claim, incorporating appellant's 7 June 2002 letter by reference. Appellant's certified claim included spreadsheets showing appellant's charges to each contract on a monthly basis from 1990 forward, and indicated the point in time when total costs exceeded contract ceilings. It also specified the costs, per contract, allowed by DCAA. Appellant's claimed costs also included costs recorded by appellant as "direct labor" and "other direct costs" (ODC) for items such as training, service/maintenance and rental of equipment. (Gov't supp. R4, tab 173; tr. 1/69-75)

59. By letter to appellant dated 2 October 2002, the PCO advised that "[t]he total documentation, reasoning and demands that Systems Integrated (SI) has turned over so far do not show any entitlement to recover." The PCO indicated that additional supporting documentation was required. (Gov't supp. R4, tab 174 at 240)

60. Appellant responded to the government by letter dated 24 April 2003. This letter revised appellant's claimed amount to $1,177,842, and provided additional supporting information. Appellant also asserted a request for equitable distribution, stating, insofar as pertinent, as follows:

> If, for some reason, you decide not to raise the cost ceiling, then the Limitations of Cost clause requires that an equitable distribution be negotiated and agreed. See subparagraph (h).

(Gov't supp. R4, tab 176 at 244)

61. By letter to appellant dated 26 June 2003, the PCO stated that appellant had provided no basis upon which the government could exercise its discretion to raise the contract ceilings and fund any cost overruns under the three contracts. The PCO cited to appellant's failure to provide notice of impending cost overruns under subsection (c) of the LOF clause (although by contract modification, the LOC clause governed in Contract No. 6021 and Contract No. 6035). The PCO did not specifically address or mention appellant's claim for the negotiation of an equitable distribution (*see* finding 69). The PCO stated that appellant failed to submit a "justiciable claim". (Gov't supp. R4, tab 177)

62. Appellant disagreed with the PCO. Its reply letter dated 22 July 2003 stated, in pertinent part, as follows:

> 4. If you elect not to exercise your discretion under the LOF and LOC clauses to increase the ceiling as requested, because of SI's perceived failure to comply with subparagraph (c), or for some other reason, you are then required to negotiate an "equitable distribution" under subparagraph (h) of the LOC clause. In this instance, the equitable distribution is most appropriately measured by the costs incurred, but an alternative is for the Navy to return the equipment for which it has not paid including 15 Sun workstations.
>
> . . . . [Y]ou and Ms. Lewis have had available all the information you need either to exercise your discretion under the LOF and LOC clauses to increase the cost ceiling, or to negotiate an equitable distribution of the property that SI

> purchased with its own funds, property which has been in the Navy's possession for many years, and for which the Navy has not paid.
>
> . . . . We reiterate the requests in our prior letters, that the Navy either (1) increase the contract price ceilings as requested, or (2) negotiate an equitable distribution measured by the costs incurred (or return the equipment not paid for), or (3) issue a final decision.

(Gov't supp. R4, tab 178)

63. The PCO issued a final decision dated 2 September 2003. The PCO stated, *inter alia*, that appellant did not receive approval to incur costs beyond the contract cost ceiling; that "attempts to get a legal retro-approval are extremely difficult and often result in a disapproval" because of lack of sufficient information; and that "attempts to acquire funds" on old projects "are virtually impossible." The PCO again did not specifically address or mention appellant's claim for the negotiation of an equitable distribution (*see* finding 69). The PCO reiterated that appellant's claim was not justiciable. (Gov't supp. R4, tab 179)

64. Appellant requested reconsideration, and the PCO met with appellant in September, 2003. Appellant submitted a letter to the PCO dated 30 September 2003, with additional supporting documentation. This documentation included documents which showed a connection between property purchased with "overrun funds", *i.e.*, property purchased after the dates of overrun, and the property produced or purchased for the government as identified in appellant's final reports to the government (see below) under each contract. (Gov't supp. R4, tab 180)

65. By cover letter to the government dated 12 August 1993, appellant submitted its final reports for each contract. These reports identified, *inter alia*, the work performed and the property produced or purchased on the government's behalf on each contract. They also included the same total cumulative costs indicated in appellant's last voucher for each contract. Appellant's 1993 final reports represented that appellant had completed each contract within its ceiling cost/available funds, *i.e.*, without any overruns. (Gov't supp. R4, tabs 55, 56 and 57) These final reports were prepared and issued before appellant's management became aware of the overruns in or around September, 1996, and before the DCAA and appellant agreed to final indirect rates for the contracts in September, 2000.

66. By letter to appellant dated 5 November 2003, the PCO again stated that appellant's claim was without merit. The PCO stated that appellant provided insufficient information to determine the validity of its claim for equipment purchases. He stated that

no authorized government official approved the incurrence of costs above those made available under the contracts, and that the government failed to receive notice of impending overruns under the contracts. He concluded that "any alleged costs above those made available on the contracts were unauthorized and erroneously charged to those contracts." The PCO again did not specifically address or mention appellant's claim for the negotiation of an equitable distribution (*see* finding 69). (Gov't supp. R4, tab 181)

67. Appellant replied to the PCO by letter dated 12 November 2003. Insofar as pertinent, appellant stated as follows:

> As I understand your letter, the Navy's position is that it has no obligation to pay our cost overruns because Systems Integrated did not give timely notice that cost ceilings would be exceeded. We have already conceded, at least for settlement purposes, that this is probably true; however, that does not mean that the Navy can refuse to pay SI for costs incurred or value received after cost ceilings were exceeded. *We have pointed out more than once that the Limitation of Cost clause requires negotiation of an "equitable distribution", and payment of costs incurred or return of the goods received. The Navy has never addressed that point nor ever attempted to negotiate an equitable distribution and that is unfortunate. . . .*

(Gov't supp. R4, tab 182) (Emphasis added)

68. According to the PCO, he did not attempt to negotiate an equitable distribution with appellant because he believed in good faith that appellant's claim was without merit (tr. 2/142, 146).

69. However the PCO conceded, and we find that he was not familiar with the equitable distribution concept at the time appellant filed its claim:

> Q And what do you now recall?
> A This is the first time [the SI letter dated 24 April 2003] that I had heard mention by Systems Integrated, and *I was somewhat unfamiliar with the term myself, equitable distribution.*
> Q *Before you received this letter from Systems Integrated, had you heard the term equitable distribution in the context of overruns on cost type government contracts before?*

A *Not that I recall.*
Q When you received this letter from Systems Integrated in April of 2003, had you ever heard of the concept that a contractor could demand return of property provided while in an overrun status if the government didn't pay the contractor for the overrun?
A I am sure at some point in time in my career I heard it. But it didn't – *it was no recall. I mean, it didn't mean anything to me when I heard it here.*

(Tr. 2/144-45) (Emphasis added)

70. Likewise, the ACO on the contracts was unaware of equitable distribution:

Q Are you familiar with the term equitable distribution?
A I am now.
Q When did you first learn or hear this term?
A When you [government trial counsel] discussed it with me.
Q And approximately when was that?
A Within the last several months.

(Tr. 2/81-82)

71. Likewise, the ACO's replacement on these contracts was unfamiliar with equitable distribution:

Q Okay. Now, are you familiar with the term equitable distribution?
A Yes.
Q When did you first learn that term in the context of government cost type contracts?
A Oh, about two months ago when you [government trial counsel] first asked me about the term.

(Tr. 2/136-37) The CA was also unfamiliar with the term (tr. 2/122-23).

72. Under Contract No. 6035, we find that appellant purchased or produced property for the government both before and after the date it exceeded the cost ceiling of the contract in May, 1991. As for the latter property, it is undisputed and we find that the government has not paid for the property. None of the property under the contract, in whole or in part, has been returned to the appellant. (App. supp. tab 80 at 11; tr. 1/118-23)

73. Under Contract No. 6021, we find that appellant purchased or produced property for the government both before and after the date it exceeded the cost ceiling of the contract in May, 1990. (Gov't supp. R4, tab 180 at 461; tr. 1/128-32) As for the latter property, it is undisputed and we find that the government has not paid for the property. None of the property under the contract, in whole or in part, has been returned to the appellant. (App. supp. R4, tab 80 at 11)

74. Under Contract No. 6031, we find that appellant purchased or produced property for the government both before and after the date it exceeded the cost ceiling of the contract in February, 1992. As for the latter property, it is undisputed and we find that the government has not paid for the property. None of the property under the contract, in whole or in part, has been returned to the appellant.

75. While the appeal was pending and prior to trial, the government conducted a search at NRL for property produced or purchased by appellant under these contracts and related to its claim. As a result of this search, the government was able to find seven items still in NRL's possession that were included in appellant's claim. (Gov't supp. R4, tab 209; tr. 3/85-95) The record does not show that the government conducted a similar search when appellant filed its claim.

DECISION[2]

Contract Nos. 6035 and 6021

Insofar as pertinent, the LOC clause in these contracts provides that if the government declines a contractor's request to increase the cost ceiling of the contract, the parties are required to negotiate an equitable distribution of all property the contractor has purchased or produced under the contract based upon the share of costs incurred by each party:

[2] By letter to the Board dated 10 May 2005, appellant withdrew its contention that it gave timely notice of overruns to the government under the contracts, and that the government abused its discretion to decline the funding of the cost overruns, stating that the only claim still before the Board concerns the government's duty to negotiate an equitable distribution. Appellant contends, *inter alia*, that the government's failure to negotiate an equitable distribution constitutes a breach of these contracts. While this legal theory was not presented to the contracting officer for decision, it involves the same operative facts presented in appellant's claim regarding the negotiation of an equitable distribution. We believe we have jurisdiction to rule upon appellant's breach of contract theory. *Trepte Construction Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595.

> (h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor *shall negotiate* an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(Emphasis added)

We conclude that appellant has shown that it incurred costs in excess of ceiling under these contracts, and that these "overrun" costs were used to purchase or produce property for the government that the government has not returned and for which it has not paid. Appellant requested reimbursement for these costs overruns, *i.e.*, requested that the cost ceilings of the contracts be increased to allow for the payment of the overruns. The government declined to increase the contract cost ceilings, which decision appellant does not now challenge. Alternatively, however, appellant sought the negotiation of an equitable distribution of property under the LOC clause based upon the costs of the property incurred by each party. The government did not negotiate, nor did it even address appellant's request in the PCO decision. We conclude that appellant is entitled to a negotiation of an equitable distribution under the LOC clause of these contracts.[3]

The government contends that appellant's claim should be barred by the equitable doctrine of laches. Laches is an affirmative defense. A party invoking laches has the burden to prove that the claimant unreasonably and inexcusably delayed the filing of its claim from the point it knew or should have known of its claim, and that the delay resulted in prejudice to the defending party. *Systems Integrated*, ASBCA No. 54439, 05-2 BCA ¶ 32,978 at 163,380.

Appellant concedes that it was definitely aware of cost overruns of roughly 1 million dollars under these contracts by September, 1996. It did not file its certified claim, however, until July, 2002.

Appellant contends, *inter alia*, that the precise amount of its cost overrun claim could not be determined until its indirect rates were determined by the DCAA, and that the DCAA prolonged the rate determination process by taking unreasonable positions on appellant's related party leases. Our view is two-fold. First, we believe that appellant significantly delayed the filing of its PFICR for FY 1990 (finding 25) and FY 1992 (finding 47), and generally delayed the filing of supporting data without regard to the lease issue (findings 27, 38, 47, 48). Second, after the indirect rates were determined by DCAA and agreed upon by appellant, appellant inexcusably delayed the filing of its

---

[3] Whether each piece of property – and its related cost—was a stand alone item, or part of a non-severable, wholly integrated system(s), may impact upon the negotiation of the equitable distribution. This is a quantum matter, and is better left to the parties for negotiation and settlement.

claim for approximately another 2 years, pending its search for its own contract files (findings 51-56). We conclude that the government has shown that appellant unreasonably and inexcusably delayed the filing of its claim.

The government argues that appellant's delayed claim precluded the government from making timely and informed decisions to safeguard property and relevant government records for purposes of a negotiation of an equitable distribution as provided by the contracts. However, this argument presumes that the PCO and ACO were at all times relevant aware of this contract duty so as to be able to make these timely and informed decisions.

The record shows that this was not the case. The record shows that the PCO, the ACO and CA were *unaware* of the government's contract duty to negotiate an equitable distribution (findings 69-71). Since the PCO and ACO were unaware of this contract duty when appellant filed its claim, they would have been unaware of this duty if appellant had filed its claim earlier. Given this unawareness, we deem it unlikely that they would have taken any action at any earlier time, directly or through subordinates, to safeguard property and government records, or to take any other action to facilitate the negotiation of an equitable distribution. Under these unique circumstances, we conclude that the government has not shown it was prejudiced by the filing of this claim in 2002.

Nor has the government shown that its legal defense of this appeal before the Board was prejudiced. The government mounted a vigorous defense of the appeal, called the PCO, the ACOs and other relevant government witnesses, cross-examined appellant's witnesses, introduced relevant documentary evidence, filed comprehensive briefs, and developed a complete record. We do not believe that the loss of certain government property records, witness notes or witness testimony through the passage of time precluded the government from effectively defending against whether appellant is entitled to the negotiation of an equitable distribution under these contracts.

For reasons stated, we conclude that the government has failed to prove its affirmative defense of laches.

Next, the government argues that appellant is barred from recovering cost overruns based upon the affirmative defense of equitable estoppel. Assuming, *arguendo*, that the government has established the four elements of equitable estoppel as it relates to the cost overruns, *F2 Associates, Inc.*, ASBCA No. 52397, 01-2 BCA ¶ 31,530 at 155,662, we note that appellant's request for reimbursement of all cost overruns has been withdrawn. The claim still before us is that the government acted wrongfully in refusing to negotiate and provide an equitable distribution of property *after* it denied appellant's claim for cost overruns. Under the LOC clause, the government's contractual duty to conduct negotiations only arises after the government declines to pay the overruns. *See JRS Industries, Inc,* ASBCA No. 32256, 86-3 BCA ¶ 19,222 (appellant not entitled to

recover cost overruns, but entitled to a negotiation of an equitable distribution under the LOC clause).

The government also contends that appellant's claim for the negotiation of an equitable distribution should be barred because appellant failed to provide timely notice of impending cost overruns under its contracts, contending that if appellant had timely notified the government of these impending cost overruns, the PCO would have stopped the work so as to eliminate any cost overruns and the need for any equitable distribution in the first instance. This contention is without merit for a number of reasons. First, the PCO's testimony to this effect was speculative. Second, the government's position is unsupported by the contract. Neither the LOC clause nor any other contract clause provides that a contractor that fails to provide timely notice of an impending cost overrun under subsection (b) of the LOC clause is barred from negotiating and receiving an equitable distribution of property purchased or produced with these costs under subsection (h) of the clause. The government's contractual duty to negotiate an equitable distribution is not dependent upon appellant's giving of notice under the contract. *Accord, JRS Industries, Inc., supra*.

Next, the government argues that appellant is barred from an equitable distribution of any property purchased or produced after expiration of the "performance periods" of the contracts. We do not agree. Again, the government's argument is unsupported by the text of the LOC clause or any other contract provision. It is axiomatic that the government may accept deliverables from a contractor after the expiration of the performance period of a contract. There is nothing of record to suggest that the government rejected or returned any property purchased or produced by appellant after the expiration of the performance period of these contracts. Indeed, appellant's final reports suggest that the government accepted all items tendered by appellant under the contracts, regardless of the date of purchase. We believe that all relevant property purchased or produced under the contracts should be part of the equitable distribution negotiation based upon the costs incurred by each party, as provided by the LOC clause.

As a related matter, the government contends that appellant is not entitled to a negotiation of certain direct labor and rental costs that were incurred by appellant under the contracts. We read subsection (h) of the LOC clause to require the negotiation of an equitable distribution of all property produced or purchased under the contract *based upon the share of costs incurred by each party* to produce or purchase that property. If the direct costs at issue are allowable and allocable under these contracts to produce or purchase said property, we see no good reason in contract or in law for such direct costs to be excluded from any negotiation. Whether these costs are allowable and allocable, and in what amounts, are matters of quantum which are remanded to the parties for negotiation and settlement.

The government also contends that since the PCO reviewed and denied appellant's claim in "good faith" the government has met its contractual responsibilities under the LOC clause of the contracts. We do not agree. Whether the PCO carried out his duties in subjective good faith is not determinative in addressing the issue of whether he complied with the LOC clause. We need not delve into the PCO's intentions, motivations or beliefs to reach our conclusion that he did not so comply.

We have duly considered all of the government's other arguments but they do not compel a different conclusion. We conclude that appellant is entitled to the negotiation of an equitable distribution of property in accordance with subsection (h) of the LOC clause under Contract Nos. 6035 and 6021.

Contract No. 6031

Contract No. 6031 was, at all times relevant, governed by the LOF clause since it was not fully funded (finding 12). The LOF clause, subsection (k) stated:

> (k) Nothing in this clause shall affect the right of the Government to terminate this contract. *If this contract is terminated,* the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each. (Emphasis added)

The government did not terminate appellant's performance of work under Contract No. 6031 (finding 18). Since Contract No. 6031 was not terminated, appellant had no contractual right to an equitable distribution of property under (k) of the LOF clause.

Appellant argues that the government did, in fact, terminate the contract since "the contract work was completed and was so certified, and because it was both actually and essentially fully funded" (app. br. at 50). It is true that appellant performed and completed the contract work, but that fact does not constitute a government "termination" of the contract. It is also true that the funding placed on the contract came close to the fully funded ceiling amount, but the government did not, in fact, fully fund the contract. Appellant has not shown that the government withheld funds from the contract to gain contractual advantage or to deprive appellant of any benefits, or otherwise acted improperly in this regard.

We believe that appellant's interpretation of the term "termination" in this context is overbroad and unreasonable. It is inconsistent with the way in which the term is used in subsection (e) of the LOF clause (finding 6), and it is inconsistent with the way the term is generally used in government contract law.

Alternatively, appellant argues that the LOF clause did not apply to this contract at all, and that the LOC clause should have governed at the time of award and thereafter. This contention is also without merit. At the time of award, Contract No. 6031 was incrementally funded, and was properly subject to the LOF clause. The contract remained incrementally funded, and was properly subject to the clause. Appellant has not shown that the government violated the contract or the regulations through the use of the LOF clause in Contract No. 6031.

We have considered appellant's other contentions but they do not compel a contrary conclusion. We believe that appellant is not entitled to a negotiation of an equitable distribution of property under this contract.

CONCLUSION

Appellant is entitled to a negotiation of an equitable distribution of property under subsection (h) of the LOC clause under Contract Nos. 6021 and 6035. Appellant is not entitled to a negotiation of an equitable distribution of property under Contract No. 6031. We remand for the negotiation of quantum. The appeal is sustained, in part.[4]

Dated: 10 May 2007

JACK DELMAN
Administrative Judge
Armed Services Board
Of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

[4] Since subsection (h) of the LOC clause is a remedy-granting clause, not unlike the Changes clause and other "equitable adjustment" clauses, we remand to the parties to fashion an appropriate remedy under the clause, *i.e.*, the negotiation of an equitable distribution, see *JRS Industries, supra*, rather than remand to determine damages on a "breach of contract" theory as requested by appellant.

Armed Services Board
of Contract Appeals

Armed Services Board
Of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54439, Appeal of Systems Integrated, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals